

**SUPREME COURT OF PENNSYLVANIA
CIVIL PROCEDURAL RULES COMMITTEE**

Proposed Recommendation No. 256

**Proposed Amendment of Rule 1033 Governing Amendments
and Rule 2232 Governing Defective Joinder**

The Civil Procedural Rules Committee proposes that Rules of Civil Procedure 1033 governing amendments and 2232 governing defective joinder be amended as set forth herein. The proposed recommendation is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court of Pennsylvania. All communications in reference to the proposed recommendation should be sent no later than **November 6, 2012** to:

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Rule 1033. Amendment

(a) A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, **change a party against whom a claim is asserted, add a person as a party,** correct the name of a party, or **otherwise** amend **[his] the** pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

(b) An amendment changing the party against whom a claim is asserted relates back to the date of the commencement of the action if, within ninety days after the period provided by law for commencing the action, the party to be brought in by the amendment has received notice of the institution of the action such that it will not be prejudiced in maintaining a defense on the merits and the party knew or should have known that the action would have been brought against the party but for a mistake concerning the identity of the proper party.

Note: Notice shall include informal knowledge of the action and is not limited to the service of original process.

Rule 2232. Defective Joinder. Change of Parties

(a) The cause of action of a person required to join in an action as a party plaintiff by Rule 2228 shall be barred by failing to join therein if the defendant has given such person such notice of the pendency of the action as the court by local rule or special order shall direct.

(b) **[Joinder of unnecessary parties is not ground for dismissal of an action. After notice to all other parties, a party may be dropped by order of the court whenever the party has been misjoined or no claim for relief is asserted against the party in the action by any other party.] Rescinded.**

(c) At any stage of an action, the court may order the joinder of any additional person who could have joined or who could have been joined in the action and may stay all proceedings until such person has been joined. The court in its discretion may proceed in the action although such person has not been made a party if jurisdiction over the person cannot be obtained and the person is not an indispensable party to the action.

(d) When a plaintiff joins two or more defendants and the evidence does not justify a recovery against all of them, the court shall enter a nonsuit or direct a verdict in favor of any defendant not shown to be liable either jointly, severally or separately, and the action shall continue and determine which of the remaining defendants are jointly, severally or separately liable with the same effect as though the defendants found to be liable were the only ones joined. As in other cases the court may enter judgment notwithstanding the verdict in favor of or against any of such defendants.

(e) In any action to enforce a joint liability, the entry of a judgment against one or more of the defendants shall not bar recovery in the same action against the other

defendants or bar recovery in a separate action against the defendants named in the first action but not served.

(f) In any action to enforce a joint and several liability, the entry of a judgment against one or more of the defendants shall not bar recovery against the other defendants in the same or separate actions or bar recovery in a separate action against any other person jointly and severally liable with the defendants.

(g) In a separate action instituted under the authority or subdivision (e) or (f) of this rule, the person against whom a judgment has been previously entered shall not again be joined as a party.

Explanatory Comment

The Civil Procedural Rules Committee is proposing the amendment of the Rule 1033 and the rescission of subdivision (b) of Rule 2232.

I.

Currently, the Rules of Civil Procedure and case law do not permit an amendment changing the party against whom a claim is asserted to relate back without a showing of concealment when the statute of limitations has expired. Rule 1033 is being amended to expressly permit amendments changing the party against whom a claim is asserted to provide for such amendments to relate back to the date of the commencement of the action if within ninety days after the period provided by law for commencing the action, the party to be brought in by the amendment has received notice of the commencement of the action such that it will not be prejudiced in obtaining a defense on the merits, and the party knew or should have known that the action would have been brought against the party but for a mistake concerning the identity of the proper party.

Consider the following example: An accident occurs on March 30, 2010. A complaint is filed on March 26, 2012 and service is made on April 16, 2012. The complaint mistakenly identifies the driver who allegedly caused the accident as Robert Young of 2012 Fifth Avenue. However, the actual driver is Richard Young, who is Robert Young's eighteen-year-old son and resides with him at 2012 Fifth Avenue. As a result of the service of the complaint, Richard Young is aware of the action, that he should have been named as the defendant, and that the complaint mistakenly identifies his father as the driver.

Under the current Pennsylvania Rules of Civil Procedure and case law, the statute of limitations would bar a court from permitting the plaintiff to file an amended

complaint changing the party against whom the plaintiff asserted his personal injury claim. The proposed amendments to Rule 1033 would permit the plaintiff to amend the complaint to change the party to Richard Young because within ninety days after the expiration of the statute of limitations, he received notice of the commencement of the action such that he will not be prejudiced in maintaining a defense on the merits and he knew that but for a mistake on the part of the defendant, the action would have been brought against Richard.

The Federal Rules of Civil Procedure and a majority of states have rules of procedure governing the relation back of amendments, which are similar to those in this proposed recommendation. The Committee unanimously favors the promulgation of this proposed amendment because the interests of justice are served by a rule of civil procedure permitting a party to correct a complaint that mistakenly names the wrong party when there is no prejudice to the party brought in by the amendment.

II.

Rule 1033 is being amended to specifically state that an amendment may add a person as a party. It is the practice of litigants and trial courts to refer to Rule 1033 when a party seeks to amend a pleading to add another party. The purpose of this amendment is to eliminate any uncertainty as to whether a motion to amend a pleading to add an additional party is governed by Rule 1033. There is no conflict between this proposed amendment and Rule 2232(c) because the latter addresses the question of when a court may order the joinder of any additional person.

III.

The Committee is proposing the rescission of subdivision (b) of Rule 2232 addressing the joinder of an additional party. The provision is unnecessary because if a party has been misjoined or no claim for relief is asserted, a dismissal should be sought through the rules governing preliminary objections, judgment on the pleadings, and summary judgment. If a plaintiff wants to drop a defendant, it should use the rules governing the discontinuance of an action.

By the Civil Procedural
Rules Committee

Diane W. Perer
Chair